IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHAEL A. GRASSMUECK, INC., as Chapter 7 Trustee for the Bankruptcy Estate of Joan Melnik,	)	No. 63644-8-I
Appellant/Cross Respondent,	)	
v.	)	UNPUBLISHED OPINION
TIMOTHY C. McSHANE and JULIE S. McSHANE, husband and wife and the marital community composed thereof,	)	
Respondents/Cross Appellant.	)	FILED: March 15, 2010

SCHINDLER, C.J. — Joan Melnik obtained a default judgment against Timothy C. McShane. After the default judgment was entered, the court granted the Chapter 7 trustee's motion to substitute as the real party in interest for Melnik. The trial court denied McShane's motion to vacate the default judgment. However, on reconsideration, the court granted McShane's motion to vacate on the grounds that the default judgment was not obtained by the real party in interest. The Chapter 7

bankruptcy trustee, Michael A. Grassmueck, appeals the order granting reconsideration and vacating the default judgment. McShane cross appeals the trial court's order denying his motion to vacate. We conclude the court erred in granting the motion to reconsider and vacating the default judgment. We reject McShane's arguments in the cross appeal and affirm the order denying his motion to vacate the default judgment.

FACTS

In June 2003, Joan Melnik filed for Chapter 7 bankruptcy. On October 3, 2003, the bankruptcy court entered an order of discharge and closed the bankruptcy case.[1]

In June 2005, Melnik sued her landlord Timothy C. McShane and his spouse Julie McShane for injuries she received when she slipped and fell on the McShanes' property in June 2002. According to the declaration of service, the McShanes were served with the summons and complaint on August 22, 2005. The McShanes did not file an answer. In November 2005, Melnik obtained an order of default. In August 2006, a default judgment was entered against the McShanes for approximately $600,000.

Almost two years later, in May 2008, the McShanes filed a motion to vacate the default judgment. The McShanes argued that service was insufficient and that the McShanes had a meritorious defense, namely that Melnik failed to provide the McShanes with notice of the allegedly defective condition on the property. The McShanes also asserted Melnik did not disclose her personal injury cause of action

[1] The order of discharge reflects a closing date of October 3, 2003.

against the McShanes in her bankruptcy case and Melnik failed to execute a CR 2A agreement proposed by McShane.

By order dated May 15, 2008, the trial court vacated the default judgment against Julie McShane for lack of personal jurisdiction and set a hearing as to the "Timothy McShane's issues." The vacation of the default judgment against Julie McShane was not appealed, and she is not a party to this appeal.[2]

In May 2008, the Chapter 7 trustee Grassmueck filed a motion to reopen Melnik's bankruptcy because of previously undisclosed assets. The trustee argued it was in the best interests of Melnik's creditors to reopen the bankruptcy and administer the undisclosed assets. The bankruptcy court granted the trustee's motion and reopened Melnik's bankruptcy.

In October 2008, the trial court granted Melnik's motion to substitute the Chapter 7 bankruptcy trustee as the real party in interest in her lawsuit against McShane and to amend the caption to substitute the Chapter 7 trustee as the plaintiff.[3] The court stayed any action to execute on the default judgment pending the completion of discovery and

[2] Any reference in this opinion to "McShane" is to Timothy McShane, unless otherwise specified. We do not consider McShane's argument that there is no basis to find service on Julie McShane sufficient. The decision to vacate the default judgment against Julie McShane was not appealed, and she is not a party to this appeal. Grassmueck makes no argument regarding service on Julie McShane, and the issue of the sufficiency of service on her is not before us.

[3] Grassmueck argues on appeal that McShane did not oppose the substitution of the trustee for Melnik. Only Grassmueck's pleadings regarding the motion to substitute the trustee and the court's order granting the motion are in the record. The order reflects that McShane did file responsive pleadings. We are unable, however, to ascertain the basis for McShane's opposition.

the ruling on McShane's pending motion to vacate.[4]

In April 2009, McShane filed a supplemental motion to vacate the default judgment. McShane argued that the default judgment should be vacated because it was fraudulently obtained by someone other than the real party in interest, Melnik lacked standing, and service on Timothy McShane was insufficient.[5]

In April 2009, the court denied McShane's motion to vacate the default judgment. McShane moved for reconsideration. For the first time, McShane argued that the default judgment was void because it was obtained by a person who was not the real party in interest. The trial court granted the motion for reconsideration and vacated the default judgment. Grassmueck filed a motion to reconsider. The trial court denied the motion. Grassmueck appeals the order granting reconsideration and vacating the default judgment.[6] McShane cross appeals the order denying his motion to vacate the default judgment.

ANALYSIS

We review a trial court's decision to grant or deny a motion for reconsideration for abuse of discretion. Drake v. Smersh, 122 Wn. App. 147, 150, 89 P.3d 726 (2004). We also review a trial court's decision to set aside a default judgment for abuse of

[4] Contrary to McShane's assertion, the trial court did not specifically reserve the issue regarding relation back of any amendment to the complaint. Rather, the court simply struck from Melnik's proposed order the provision stating "and the amendment shall relate back to the date the original complaint was filed."

[5] McShane listed other grounds but did not present argument on them.

[6] Grassmueck filed an amended notice of appeal to also appeal the trial court's June 12, 2009 order granting McShane's motion to dismiss the claims against him with prejudice.

discretion. Little v. King, 160 Wn.2d 696, 702, 161 P.3d 345 (2007).

Because McShane raised the argument that the default judgment was void because it was not obtained by the real party in interest for the first time in his motion to reconsider, Grassmueck contends that the trial court abused its discretion in granting reconsideration. We agree. CR 59 does not permit a party to propose a new theory of the case in a motion for reconsideration. Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 241, 122 P.3d 729 (2005); JDFJ Corp. v. International Raceway, Inc., 97 Wn. App. 1, 7, 970 P.2d 343 (1999). Consequently, the trial court abused its discretion in considering McShane's new theory related to real party in interest on reconsideration.

Nonetheless, we also conclude that the trial court erred in concluding the judgment was void because the bankruptcy trustee was the real party in interest. All rights of action in which a debtor has an interest become property of the bankruptcy estate under 11 U.S.C. § 541. Linklater v. Johnson, 53 Wn. App. 567, 570, 768 P.2d 1020 (1989). Here, although Melnik did not disclose her potential cause of action against the McShanes in her bankruptcy court schedules, her cause of action was nevertheless a part of her bankruptcy estate. See Crumpacker v. DeNaples, 126 N.M. 288, 293, 968 P.2d 799, 805-06 (1998) (cited in Sprague v. Sysco Corp., 97 Wn. App. 169, 178, 982 P.2d 1202 (1999)) ("A trustee in bankruptcy succeeds to all causes of action held by the debtor at the time the bankruptcy petition is filed, including causes of action which the debtor fails to disclose in his bankruptcy schedules. This includes pre-

petition and unliquidated claims for personal injuries.") (citation omitted). The trustee succeeded to Melnik's cause of action against the McShanes and was, therefore, the real party in interest. Sprague, 97 Wn. App. at 176. n.2 (the real party in interest is the person who possesses the right sought to be enforced).

Every action must be prosecuted in the name of the real party in interest. CR 17(a). Substitution of the real party in interest has the same effect as if the action had been commenced in the name of the real party in interest. CR 17(a). Courts routinely allow a bankruptcy trustee to be substituted for a plaintiff-debtor. See Sprague, 97 Wn. App. at 177-79 (collecting cases); Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 160 P.3d 13 (2007); Bartley-Williams v. Kendall, 134 Wn. App. 95, 138 P.3d 1103 (2006).

On appeal, McShane argues that because the default judgment was final, the trustee could not be substituted as the real party in interest because the default judgment was final. This argument fails because the premise that the default judgment was final, is faulty. At the time the trustee was substituted as the real party in interest, McShane's motion to vacate the default judgment was pending. Accordingly, the default judgment was not, as McShane asserts, final. See Purse Seine Vessel Owners Ass'n v. State, 92 Wn. App. 381, 387, 966 P.2d 928 (1998) ("A judgment is considered final on appeal if it concludes the action by resolving the plaintiff's entitlement to the requested relief."). We conclude the trial court abused its discretion in reconsidering its order denying McShane's motion to vacate the default judgment based on the

argument that substitution of the trustee was not proper.

McShane cross appeals the trial court's order denying his motion to vacate. McShane argues that the court erred in determining that service on him was valid.[7] We disagree. A declaration of service is presumed valid if it is regular in form and substance. State ex rel. Coughlin v. Jenkins, 102 Wn. App. 60, 65, 7 P.3d 818 (2000). A declaration of service must state the time, place, and manner of service. CR 4(g)(7). Here, because the declaration of service on McShane states the time, place, and a manner of service as permitted by RCW 4.28.080(15), the declaration is presumptively valid. Accordingly, the burden is on McShane to show by clear and convincing evidence that the service was improper. Jenkins, 102 Wn. App. at 65; Leen v. Demopolis, 62 Wn. App. 473, 478, 815 P.2d 269 (1991).

McShane testified that he was never served with the summons and complaint and, although he vaguely remembered buzzing a person into his secured apartment building, he claims that the individual did not identify himself and did not hand McShane any documents. The process server, however, testified that, although he did not remember the particular service on McShane, he would never have left the summons and complaint on McShane's doorstep or with a person who did not confirm that he or she lived at the address on the summons. As reflected in the process

[7] McShane filed a reply to Grassmueck's response to McShane's cross appeal. To the extent the reply is an improper surreply, we do not consider it. See RAP 10.1(b)(c). We likewise do not consider arguments Grassmueck raises for the first time in his reply brief. King v. Rice, 146 Wn. App. 662, 672, n.30, 191 P.3d 946 (2008), rev. denied, 165 Wn.2d 1049 (2009).

server's declaration of service, he served the summons and complaint on a male who refused to give his name, but who stated he was a resident of McShane's apartment. Service on a person who states that he lives at the residence, but refuses to give his name has been held valid in the face of a defendant's adamant denials of receipt of the documents. Woodruff v. Spence, 88 Wn. App. 565, 945 P.2d 745 (1997). McShane has not met his burden of proving, by clear and convincing evidence, that the service was improper.

McShane also argues that the trial court erred by not granting his motion to vacate the default judgment on the grounds of lack of notice, that he was diligent in moving to vacate once he learned of the default judgment, Melnik's fraud in failing to list the cause of action in her bankruptcy schedules, and the amount of the judgment. Resolution of a motion to vacate a default judgment is left to the sound discretion of the trial court, whose decision we will not disturb unless the trial court abused its discretion or its exercise of discretion was manifestly unreasonable or based on untenable grounds or reasons. Hwang v. McMahill, 103 Wn. App. 945, 949-50, 15 P.3d 172 (2000).

To the extent McShane's motion to vacate under CR 60(b) was based on excusable neglect or the amount of the judgment, it was too late. CR 60(b)(1) (A motion to vacate a judgment based on excusable neglect or irregularity in obtaining a judgment or order must be made no later than one year after the judgment is entered).

In addition, CR 60(b) is not a substitute for an appeal. Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980) (citation omitted). A CR 60(b) motion is confined to matters extraneous to the final order or judgment and is limited to the propriety of the denial, not the impropriety of the underlying orders. Bjurstrom, 27 Wn. App. at 450-51. Further, McShane provided no authority to support his assertion that Melnik's failure to list the cause of action in her bankruptcy schedules was tantamount to fraud. And, as to McShane's argument regarding lack of notice, he fails to demonstrate that the trial court's rejection of that argument was an abuse of discretion. In sum, we conclude the trial court did not abuse its discretion in denying McShane's motion to vacate the default judgment.

CONCLUSION

We reverse the trial court's order granting McShane's motion to reconsider, the order vacating the default judgment, and the order of dismissal. We affirm the trial court's order denying McShane's motion to vacate the default judgment.

WE CONCUR: